

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2009 Session

KIMBERLY YVETTE AMOS v. KEVIN JERAY AMOS

**Appeal from the Circuit Court for Rutherford County
No. 55927 Don R. Ash, Judge**

No. M2009-00777-COA-R3-CV - Filed January 25, 2010

In this marriage of short duration, the husband contends that the trial court erred by not dividing the property in a way that, as nearly as possible, placed the parties in the same position they would have been in had the marriage never taken place. Specifically, Husband contends that the trial court failed to take into consideration his substantial contribution to the acquisition of the marital residence. Wife also appeals the trial court's division of property asserting that the trial court should have awarded her a portion of Husband's retirement account and stocks acquired before the marriage that had grown in value during the marriage even though no contributions had been made during the marriage. We have determined that the trial court expressly noted the short duration of the marriage but failed to properly apply the relevant factors as stated in *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988) to divide the property in a way that, as nearly as possible, placed the parties in the same position they would have been had they never married. Therefore, we modify the division of the marital property and affirm the trial court in all other respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part; Modified in Part**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Randall Pierce, Nashville, Tennessee, for the appellant, Kevin Jeray Amos.

Lance B. Mayes, Nashville, Tennessee, for the appellee, Kimberly Yvette Amos.

OPINION

Kimberly Yvette Amos and Kevin Jeray Amos married on July 26, 2003, in Milwaukee, Wisconsin when she was 32 and he was 39 years of age. Just prior to the marriage, Wife had graduated with a nursing degree. She received her license as a nurse in

December 2003, after which she accepted a nursing position at a hospital in Wisconsin that included benefits and a signing bonus. She had only worked there for a short period of time when the couple made the decision to move to Tennessee because Husband accepted a job with Dell Computers.¹ Because she only worked for the hospital in Wisconsin for a brief period of time, Wife was required to repay the signing bonus to the hospital.

After moving to Tennessee, Wife accepted employment at Baptist Hospital in Nashville, Tennessee, and Husband continued to work at Dell until January 2008, when he accepted a job with Nissan Corporation. During the first two years of the marriage, the parties agreed that Husband would pay the family expenses from his income while Wife saved her income with the plan to apply the savings to the purchase or construction of the couple's first home.

In 2005, after two years of marriage, the couple purchased a lot in Nolensville, Tennessee, as husband and wife, upon which they intended to build their first home. It is undisputed that Husband applied \$40,000 of his separate property, funds he acquired before the marriage, to purchase the lot. They jointly obtained a mortgage loan to fund most of the cost to construct the home; nevertheless, it is undisputed that Wife contributed \$57,761 that she had saved during the first two years of their marriage toward the cost of construction.² Husband also contributed an additional \$50,000 toward the construction costs, near the completion of construction, to ensure timely completion. These funds came from the liquidation of a portion of Husband's separate property. Thereafter, both of them contributed to the upkeep and maintenance of the home.

In September of 2007, after a mere four years of marriage, Wife filed for divorce. A petition for relief *pendente lite* support was filed and a Special Master was appointed to determine financial responsibilities of the parties pending the final resolution of the case.³ The petition for *pendente lite* support was heard on November 7, 2007. The Special Master issued his report on November 21, 2007, finding that Husband's current income was \$92,000 per year and Wife's current income was \$65,000 per year, and recommending that Husband be required to pay sixty percent (60%) and Wife forty percent (40%) of the \$2,088 monthly house note.

¹Husband was unemployed prior to the move to Tennessee.

²During the time that Wife was saving money for the down payment, Husband was paying all of their living expenses.

³There are no children.

Thereafter, the parties engaged in extensive discovery, which produced a number of discovery disputes. On February 20, 2008, Husband propounded to Wife a First Set of Interrogatories and Request for Production of Documents. Wife returned responses on March 21, 2008, which Husband believed to be deficient. As a consequence, Husband filed a Motion to Compel. Wife subsequently produced a supplemental response that included her income tax return from 2007, which indicated her income for 2007 was \$114,515, substantially greater than the \$65,000 found by the Special Master during the *pendente lite* hearing. The discovery disputes continued through the date of the trial.⁴

Following an evidentiary hearing in January 2009, the trial court declared the parties divorced, finding each responsible for the divorce. The court ordered Wife to be solely responsible for debts on her credit cards, specifically her Chase card and her Capital One card, and ordered Husband to be responsible for the debt on his Discover credit card. The parties owned four vehicles, and the court awarded two of the vehicles to Wife, a Jeep Wrangler and a Chevy Malibu, and two of them to Husband, a Yamaha and an Acura MDX. The court found that Husband's Corning stocks and his retirement account with Oil Gear, both of which Husband earned and acquired prior to the marriage, were the separate property of Husband. As for Husband's Nissan retirement account,⁶ which began and accrued during the brief marriage, it was classified as marital property and Husband was ordered to pay Wife \$2,154 for her marital interest in this retirement account. The court also found the couple's house to be marital property due to the fact it was acquired during the marriage. As for the equitable division of the equity in the marital residence, after commenting on the short duration of the marriage, the trial judge stated:

I'm also going to find that with the house, the husband was making greater contributions but they still were contributing to a joint account or a joint household. Based on that division I think it's appropriate that he receive 55 percent of the equity in the house and she receive 45 percent.

The court found the equity in the martial home was \$159,876.18, and by applying the percentages set above, Husband was ordered to pay Wife \$71,944.28 for her 45 percent share of the equity.

⁴ At trial, Husband claimed that he was not provided with Wife's bank records, and these documents were also the basis of the Motion to Compel. Husband objected to their admission; however, the trial court overruled Husband's objection and admitted Wife's compilation of her 2005 and 2006 bank statements into evidence.

⁶ Husband went to work for Nissan after the parties married.

The court denied Wife's request for spousal support finding that throughout the marriage Wife had earned more than Husband and given that they had similar education levels, the duration of the marriage, and their good mental and physical health, there was no need for alimony. The trial court also noted that Wife had significantly under-reported her income and was getting the benefit of additional funds for several months during the pendency of the divorce proceedings.

Both parties appeal. Husband appeals contending the trial court erred by not dividing the property in a way that, as nearly as possible, placed the parties in the same position they would have been in had they never married. Wife appeals, contending the trial court erred by not awarding her any portion of the retirement accounts that Husband acquired before the marriage that had grown in value during the marriage.

DIVISION OF THE MARITAL ESTATE

Husband relies on this Court's ruling in *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988) to contend the trial court erred by not dividing the property in a way that, as nearly as possible, placed the parties in the same position they would have been in had they never married. In this regard, he seeks to recover the \$90,000 he contributed from his separate property to purchase the lot and to construct the marital residence. He also seeks to have Wife held solely responsible for the student loan obligations she brought into the marriage, which she paid off shortly before filing for divorce by charging the balance owed to Husband's credit card.

Tennessee Code Annotated § 36-4-121(c)(1) permits trial courts to consider the duration of the marriage, and in cases involving a marriage of relatively short duration, *Batson* stands for the proposition that, "it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place." *Batson*, 769 S.W.2d at 859 (Tenn. Ct. App. 1988) (citing *In re Marriage of McInnis*, 661 P.2d 942, 943 (Or. Ct. App. 1983)). As *Batson* explained:

When relatively short marriages are involved, each spouse's contributions to the accumulation of assets during the marriage is an important factor. *In re Marriage of Peru*, 56 Or. App. 300, 641 P.2d 646, 647 (1982). When a marriage is short, the significance and value of a spouse's non-monetary contributions is diminished, and claims by one spouse to another spouse's separate property are minimal at best. *In re Marriage of Wallace*, 315 N.W.2d 827, 830-31 (Iowa Ct. App. 1981).

Batson, 769 S.W.2d at 859.

Husband contends that the trial court's division of the marital property was inequitable in that it failed to place the parties in approximately the same position as they were in prior to the marriage. His argument is principally based on his claim that he contributed \$90,000 of his separate assets to the acquisition of the marital residence. Essentially, he contends that he should recover his \$90,000 of separate property he contributed from the existing equity in the house prior to a division of that equity.

Although the trial court expressly noted this was a marriage of short duration, and that Husband contributed \$90,000 of his separate property toward the marital residence, it appears the court did not correctly apply the most relevant factor under *Batson*, that being "each spouse's contributions to the accumulation of assets during the marriage." *Id.* at 859 (citing *In re Marriage of Peru*, 641 P.2d at 647). We fully agree with the trial court's finding that "the husband was making greater contributions but they still were contributing to a joint account or a joint household," however, the trial court's division of the equity in the marital residence failed to recognize the importance of the \$90,000 cash contributions from Husband's separate property during this very brief marriage. We acknowledge that Wife saved \$56,000 from the salary she earned during the marriage and that this sum was contributed toward the construction costs.⁷ Her contribution, although substantial, was earned and accrued *during the marriage*. Moreover, the \$56,000 she was able to save was due to the fact the couple had agreed that Husband would pay the couple's living and household expenses so that she could save much of her salary. Accordingly, the \$56,000 contribution was from marital property, not Wife's separate property.

The equitable division of marital property is to be guided by the factors contained in Tennessee Code Annotated § 36-4-121(c), and it should be determined by considering and weighing the most relevant factors in light of the unique facts of each case. The most relevant factors in this case are: (1) the short duration of this marriage, and (2) that Husband contributed \$90,000 of his separate property toward the purchase of the lot and the construction of the house.

By applying *Batson* principles to this very brief marriage, we find that Husband should recover his \$90,000 contribution from the equity in the marital residence before the remaining equity is divided. The court found that the total equity in the marital home was \$159,876.18. If we allocate \$90,000 to Husband, that leaves \$69,876.18 to be divided between Husband and Wife. Because we have applied the *Batson* principles, it is no longer equitable to allocate 55 percent to Husband; instead, each spouse should be allocated 50 percent of the remaining equity of \$69,876.18 as we find their contributions were equal with

⁷ Wife claimed that she contributed \$12,000 of her separate property to the purchase of the lot; however, she failed to produce any documentation to support this claim.

the exception of Husband's \$90,000 contribution from his separate property. Accordingly, we modify the trial court's division of the marital property and on remand, the trial court should order Husband to pay Wife \$34,938.09 for her 50 percent share of the remaining equity in the marital residence.

We acknowledge Husband's contentions that he is entitled to even more given Wife's evasive discovery responses and what he claims was "an unauthorized \$10,000 charge she made to [his] Discover Card to pay off her student loan." We, however, find his argument unpersuasive as did the trial court. Tennessee Code Annotated § 36-4-121(c)(5) provides that dissipation, whether of marital or separate property, may be considered in the context of the division of marital property.⁸ See *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006). It does appear that just a few months before filing for divorce Wife charged \$10,000 to Husband's credit card to pay off the balance of her school loan; nevertheless, it also appears that Wife had made payments on Husband's credit card debt and continued to do so until she filed for divorce. The record reveals the trial court considered the alleged dissipation of marital funds when it required the parties to be solely responsible for their separate credit card accounts, and we find no error with that decision.

RETIREMENT ACCOUNTS

Wife contends the trial court erred by not awarding her any portion of the retirement accounts that Husband acquired before the marriage that had grown in value during the marriage, referring to Husband's Corning stocks and Oil Gear retirement account. The evidence presented at trial reveals that the increases in the value of those accounts was purely market-driven and Wife offered no evidence to show that Husband had contributed to either account during the marriage. Tennessee Code Annotated § 36-4-121(b)(2)(A) & (C) recognizes the following assets as separate property: "[a]ll real and personal property owned by a spouse *before marriage*, including, but not limited to, assets held in individual retirement accounts (IRAs) . . . [and] [i]ncome from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1)." (emphasis added). Had Wife established that Husband contributed to the accounts during the marriage, the circumstance would be different. See *Snodgrass v. Snodgrass*, 259 S.W.3d 240 (Tenn. 2009) (holding that "contributions to the parties' 401(k) accounts that were made during the marriage, and the net gains on those contributions realized during the

⁸ Although Tennessee Code Annotated § 36-4-121 does not define "dissipation," the term typically refers to "the use of funds after a marriage is irretrievably broken." *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006) (citing *Altman v. Altman*, 181 S.W.3d 676, 681-82 (Tenn. Ct. App. 2005) (observing that dissipation of marital property occurs "when the marriage is breaking down")). Dissipation, therefore, generally occurs in contemplation of the dissolution of a marriage. *Broadbent*, 211 S.W.3d at 220.

marriage, meet the definition of marital property as “property . . . acquired . . . during the course of the marriage.” *Id.* at 247 (citing Tenn. Code. Ann. § 36-4-121(b)(1)(A)). There is no evidence that Husband made any contributions to either account during the marriage; thus, the trial court was correct in holding the Corning stocks and the Oil Gear retirement accounts to be separate property.

IN CONCLUSION

The judgment of the trial court is affirmed in part and modified in part and is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the parties equally.

FRANK G. CLEMENT, JR., JUDGE